

OPINION
63-246

December 18, 1963 (OPINION)

STATE OFFICIALS

RE: Attorney Generals - Duties

This is in reply to your letter of December 13, 1963, in regard to the effect of the Attorney General's Opinion to a state officer in the future conduct of that state officer in the discharge of his state duties and obligations.

It is a bit difficult to give a complete picture of all the law on this particular point. However, we believe the following outlines the statutory and case law on the subject:

Section 54-12-01(6) of the North Dakota Century Code provides as follows:

54-12-01. ATTORNEY GENERAL - DUTIES. The attorney general shall:

* * * * *

6. Consult with and advise the governor and all other state officers, and when requested give written opinions on all legal or constitutional questions relating to the duties of such officers respectively;

* * * * *."

The two cases in this state where the matter was discussed at greatest length were Department of State Highways v. Baker, 69 N.D. 702. 290 N.W. 257, and State ex rel. Johnson v. Baker, 74 N.D. 244, 21 N.W.2d. 355.

In Department of State Highways v. Baker (cited supra) the court held in part if we may quote from the syllabus:

2. Under the circumstances in this case wherein it appears that the state auditor is a constitutional officer against whom a proceeding is brought to compel her to disburse public funds under a statute which the attorney general, who is her legal adviser and is also a constitutional officer, has advised is unconstitutional, and the question of constitutionality is of great public importance affecting many people, the public revenue of the state and one of the major departments of the state government, it is held that the state auditor may question the constitutionality of the statute upon which the proceedings are based."

In State ex rel. Johnson v. Baker, 74 N.D. 244, 21 N.W.2d. 355, the

court held in part if we may quote from the syllabus:

5. Pursuant to the constitution and the statutes of the State of North Dakota, when a state officer is in doubt as to the constitutionality of a statute, under the terms of which he is called upon to perform a ministerial act, it is his duty to consult with and procure the opinion of the attorney general with respect to the matter and be guided in his action by that opinion until it is superseded by judicial decision. If he follows this course he will be protected and absolved from liability under his oath and on his official bond. If he does not request an opinion from the attorney general, or having done so disregards it, and refuses to perform as required by the statute, he cannot raise the question of its constitutionality as a defense in a mandamus proceeding to compel performance."

The court in the State ex rel. Johnson v. Baker case (supra) does give quite a general picture of the office of the attorney general under our constitution and statutes as follows: (pages 258 and 259 of the North Dakota Report)

The attorney general also is a constitutional officer. His powers and duties like those of the auditor are not prescribed by the constitution but by legislative enactment. See Sections 82 and 83 N.D. Constitution. Chapter 54-12, comprising Sections 54-1201 to 54-1211 Rev. code 1943, prescribes those powers and duties. Section 54-1201, supra, provides among other duties the attorney general shall 'appear for and represent the state before the supreme court in all cases in which the state is interested as a party, appear and defend all actions and proceedings against any state officer in his official capacity If both parties to an action are state officers, the attorney general may determine which officer he will represent; Consult with and advise the governor and all other state officers, and, when requested, give written opinions on all legal or constitutional questions relating to the duties of such officers respectively; Give written opinions when requested by either branch of the legislative assembly upon legal questions; keep in his office a book in which he shall record all the official opinions given by him during his term of office, such book to be delivered by him to his successor in office.' Thus the attorney general is made the legal adviser of both the Legislative Assembly and the state officers and it is particularly to be noted that he shall give written opinions to the Legislative Assembly upon legal questions and shall consult with and advise the governor and all other state officers and, when requested, give opinions not only on all legal questions but also on all constitutional questions relating to the duties of such officers. And the opinions so written must be recorded in a book which must be delivered to his successors in office. Reading this statute we can reach no other conclusion than that the Legislature, thus imposing these duties upon the attorney general made him the legal adviser for the state auditor as well as for the other state officers, whose opinions shall guide these officers until superseded by judicial decision; that it took note of the fact

that these officers are not required to be learned in the law and contemplated that when any constitutional or other legal question arises regarding the performance of an official act their duty is to consult with the attorney general and be guided by the opinion which that office, if requested to do so, must give them. If they follow this course they will perform their duty, and even though the opinion thus given them be later held to be erroneous, they will be protected by it. If they do not follow this course they will be derelict to their duty and act at their peril."

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